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No. 07-829

In The

Supreme Court of the United States

GARY RODRIGUES AND ROBIN SABATINI,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is application of the Ninth Circuit Model Jury Instruction on "honest services" fraud unconstitutional because it omits any concept of deception as an element of the crime – contrary to established law and pattern instructions from other Circuits?

2. What is the appropriate test for determining whether a union benefit plan is subject to the Employee Retirement Income Security Act of 1974 ("ERISA") – an issue as to which there are deep divisions between the Circuits?

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OPINION BELOW

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit affirming the petitioners' convictions is reported at *United States v. Rodrigues* and *United States v. Sabatini*, 237 Fed. Appx. 178 (9th Cir. 2007) (2007 WL 1675012), and appears at Appendix A.

JURISDICTION

On June 11, 2007, the Ninth Circuit filed its opinion affirming petitioners' convictions. On August 21, 2007, the Ninth Circuit denied petitioners' timely petition for rehearing. The Ninth Circuit issued its mandate on September 25, 2007. On November 20, 2007, this Court extended the deadline for filing this petition to December 19, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY & CONSTITUTIONAL PROVISIONS INVOLVED

- 18 U.S.C. § 1341 provides as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any

counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

• 18 U.S.C. § 1954 provides as follows:

Whoever being

(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or

(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or

(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined under this title or imprisoned not more than three years, or both: *Provided*, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

As used in this section, the term (a) "any employee welfare benefit plan" or "employee pension benefit plan" means any employee welfare benefit plan or employee pension

> benefit plan, respectively, subject to any provision of title I of the Employee Retirement Income Security Act of 1974, and (b) "employee organization" and "administrator" as defined respectively in sections (3)(4) and (3)(16) of the Employee Retirement Income Security Act of 1974.

• Ninth Circuit Model Jury Instruction 8.26.2 reads as follows:

> MAIL FRAUD-SCHEME TO DEFRAUD:
>
> The defendant is charged in [Count ___ of] the indictment with mail fraud in violation of Section 1341 of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> First, the defendant made up a scheme or plan to deprive ___ of [his][her] right to honest services;
>
> Second, the defendant acted with the intent to deprive ___ of [his][her] right to honest services;

• The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor

> shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On April 10, 2002, a Superceding Indictment was filed containing 102 counts of mail fraud, money laundering, conspiracy and other related charges against petitioner Gary Rodrigues and his daughter, petitioner Robin Sabatini. All of the charges arose from Rodrigues' position as the State Director of the United Public Workers, a labor organization in Hawaii.

Petitioners' trial began on October 1, 2002. On November 19, 2002, petitioners were convicted on all counts before the jury. (One count was dismissed.) The petitioners then filed post-trial motions for acquittal and a new trial, which were denied by the district court on January 31, 2003. On September 30, 2003, the district court sentenced Rodrigues to 60 months imprisonment. On December 9, 2003, the district court sentenced Sabatini to 46 months imprisonment. The Ninth Circuit affirmed petitioners' convictions on June 11, 2007. (App. A.)

REASONS FOR GRANTING THE PETITION

This Court should grant the instant petition for the reasons provided in Supreme Court Rule 10, subsections (a) and (c).

I. QUESTION ONE: MAIL FRAUD

A. Circuit Split

The Ninth Circuit decision below affirmed application of the Ninth Circuit's Model Jury Instruction on "honest services" mail fraud, which does not require an act of deception, misrepresentation, or omission of fact as an element of the offense. *See* Ninth Circuit Model Jury Instruction 8.26.2. The Ninth Circuit panel below concluded that "[n]o specific false statement, misrepresentation, or omission is necessary" for a conviction for mail fraud under the theory of a depravation of "honest services," pursuant to 18 U.S.C. § 1341. (App. A.)

The Ninth Circuit's decision is in direct conflict with established law from other Circuits. *See*, *e.g.*, *United States v. Sawyer*, 85 F.3d 713, 728 (1st Cir. 1996) ("To establish mail fraud – in cases involving honest services fraud and otherwise – the alleged scheme must involve deception in the deprivation of money, property, or the right to honest services."); *United States v. Brown*, 459 F.3d 509, 522 (5th Cir. 2006) (holding that a "knowing fiduciary breach" is a required element of all fraud cases).

The Ninth Circuit's model jury instruction is also at odds with pattern instructions from other Circuits. *See, e.g.*, Pattern Criminal Jury Instructions For the District Courts of the First Circuit, instruction 4.12 (requiring an "intent to defraud" or obtain property "by means of fraudulent pretenses."); Fifth Circuit District Judges Association Pattern Jury Instructions (Criminal), instruction 2.59 (requiring that the "scheme to defraud employed material false representations."); Eleventh Circuit Pattern Jury Instructions, instruction 50.2 (requiring an "intent to defraud.").

B. Conflict with Supreme Court Law

The Ninth Circuit law on mail fraud also conflicts with this Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), which holds that "the well-settled meaning of 'fraud' require[s] a misrepresentation or concealment of material fact" and that "materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes."

II. QUESTION TWO: ERISA

Petitioner Rodrigues was convicted on Count 102 for receiving kickbacks from a life insurance plan in violation of 18 U.S.C. § 1954. Federal jurisdiction over this crime turns on whether the insurance plan is covered by ERISA.

Circuit Courts have established different tests for determining ERISA jurisdiction. *Compare Silvera v.*

Mutual Life Ins. Co. of New York, 884 F.2d 423, 426 (9th Cir. 1989) (applying the Department of Labor's four-part test), *with Otto v. Variable Annuity Life Ins. Co.*, 814 F.2d 1127, 1135 (7th Cir. 1986) (declining to apply the Department of Labor's four-part test). The Circuits are also split on the standard of appellate review. *Compare Kanne v. Connecticut General Life Insurance*, 867 F.2d 489, 492 (9th Cir. 1988) (reviewing for clear error); *with Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254, 256 (8th Cir. 1994) (reviewing de novo).

ARGUMENT

I. DECEPTION IS A REQUIRED ELEMENT OF MAIL FRAUD

A. Introduction

Most of the charges in this case (93 of 102 counts) related to a dental benefit contract negotiated by Rodrigues. The Superceding Indictment charged a single, unitary scheme related to this contract: Rodrigues directed inflated consulting fees to his daughter, Sabatini, who did no work to earn them.

At the close of the government's case at trial, the district court correctly ruled that the government failed to prove that petitioners defrauded the union or its members of any money or property and struck the government's property loss allegation from the indictment. However, the district court permitted the government to proceed on the theory that the union

had been deprived of Rodrigues' "honest services," pursuant to 18 U.S.C. § 1341. The district court then ruled, over objection, that the "honest services" theory of mail fraud required neither the making of false statements nor the omission of material facts. Accordingly, the district court's jury instructions on these counts included no element of deceit or of an intent to deceive. The instructions were consistent with the Ninth Circuit's model instruction. *See* Ninth Circuit Model Jury Instruction 8.26.2. On appeal, the Ninth Circuit confirmed its opinion that deception is not a necessary element of mail fraud. (App. A.)

Simply put, the Ninth Circuit's model instruction is wrong. Deceit is always a necessary element of mail fraud. *See Neder*, 527 U.S. at 25 ("[F]alsehood is an element of the federal mail fraud."); *Sawyer*, 85 F.3d at 728 ("[Mail fraud] must involve deception.").

B. Deception Is a Required Element of "Honest Services" Mail Fraud

In *Neder*, this Court held that in order to gain a conviction under 18 U.S.C. § 1341, the government must always allege and prove that a defendant devised a scheme to deceive. *Neder*, 527 U.S. at 23, 25; *see also Durland v. United States*, 161 U.S. 306, 313 (1896) (holding that mail fraud includes "every thing designed to defraud *by misrepresentations* as to the

past or present, or suggestions and promises as to the future.") (emphasis added).[1]

At trial, petitioners specifically requested an instruction which would have required that the government prove beyond a reasonable doubt that the defendants had engaged in a scheme involving material falsehoods or omissions. The district court rejected this request and gave an instruction on mail fraud that made no reference either to material omissions or the quintessential element of fraud: the intent to cheat or deceive.

The district court's instructions below stated that the *actus reus* of mail fraud was whether "the defendant knowingly devised a scheme or artifice to deprive [the union] and its members of their right to defendant['s] . . . honest services[.]" The question of intent asked whether "the defendant acted with the intent to deprive [the union] and its members of their right to the honest services[.]"

Simply put, the district court's omission of the element of deception from its mail fraud instructions violated petitioners' right to due process. *In re Winship*, 397 U.S. 358, 364 (1970) ("The due process clause requires proof beyond a reasonable doubt of

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[1] The requirement of deceit or misrepresentation applies with the same force to schemes to defraud of honest services as to those designed to wrongfully obtain another's property. *United States v. Vinyard*, 266 F.3d 320, 326 (4th Cir. 2001); *United States v. Sawyer*, 85 F.3d 713, 728 (1st Cir. 1996).

every fact necessary to constitute the charged crime."); *Sullivan v. Louisiana*, 508 U.S. 275 (1993); *United States v. Gaudin*, 515 U.S. 506 (1995).

C. Ninth Circuit Law Must Be Corrected

The government successfully argued at trial that the element of deceit was eliminated from the theory of honest services mail fraud in *United States v. Munoz*, 233 F.3d 1117, 1130 (9th Cir. 2002), and *United States v. Halbert*, 640 F.3d 1000, 1007 (9th Cir. 1981). In affirming petitioners' convictions, the Ninth Circuit reiterated that "[n]o specific false statement, misrepresentation, or omission is necessary" for an honest services fraud conviction if the scheme "[is] reasonably calculated to deceive." (App. A.)

In other words, the Ninth Circuit has concluded that deception is not a specific element of honest services mail fraud and need not be *proven* if deception is reasonably *inferred* from the facts. This conclusion cannot be squared with the mail fraud statute; it reduces the government's burden at trial; and it stands in direct conflict with the law of this Court and other Circuits. *See, e.g.*, *Neder*, 527 U.S. at 23, 25; *Vinyard*, 266 F.3d at 326; *Sawyer*, 85 F.3d at 728. The Ninth Circuit's determination that deception is not a "necessary" element of mail fraud must be corrected.

II. FEDERAL JURISDICTION UNDER ERISA IS NOT SUBJECT TO A TOTALITY OF CIRCUMSTANCES TEST

A. Introduction

Petitioner Rodrigues was charged in Count 102 of the Indictment with receiving kickbacks from the provider of a union life insurance plan, in violation of 18 U.S.C. § 1954. Receiving kickbacks from an insurance plan is a federal offense only if the plan in question is subject to ERISA. Insurance plans are subject to ERISA if they are "established or maintained" by a private employer. A plan established or maintained by a local or state government employer is exempt from ERISA jurisdiction. *See* 29 C.F.R. § 2510.3-1(j).

Petitioner contended before, during, and after trial that he could not be convicted of violating 18 U.S.C. § 1954 because the State of Hawaii's involvement in the life insurance plan at issue in this case precluded ERISA jurisdiction.[2] The jury's conclusion

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[2] Undisputed evidence below established that: (1) the creation of the union life insurance plan was authorized by state statute; (2) the employer, the state of Hawaii, made a contribution to the plan on behalf of each employee member; (3) the State Health Fund Board had to approve the establishment of the plan; (4) this approval required the union to submit a certifying letter, agreeing to maintain and furnish records and to be audited by the State Health Fund; (5) the union had in fact filed certificates for the life insurance plan with the Health Fund; and (6) the Health Fund had exercised its authority to audit the life insurance plan on at least one occasion.

(Continued on following page)

that the insurance plan here fell under ERISA was not only incorrect – but more fundamentally, the district court's decision to let the jury decide the issue based on a "totality of circumstances" test is contrary to regulations promulgated by the Department of Labor. *See* 29 C.F.R. § 2510.3-1(j).

B. The District Court's Improper Totality of Circumstances Test

The district court instructed the jury to consider criteria promulgated by the Department of Labor in determining whether the insurance plan was "established or maintained" by a private entity (and therefore subject to federal jurisdiction) or "established or maintained" by a state entity (and therefore exempt). In particular, the jury was instructed to consider criteria published in 29 C.F.R. § 2510.3-1(j):

> (1) Whether the plan was funded entirely by private contributions;
>
> (2) Whether participation in the program was completely voluntary;
>
> (3) Whether the sole functions of the employer or employee organization with respect to the program are . . . to permit the insurer to publicize the program to

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In response, the government contended only that the employer contribution made by the state was very small (less than 3 percent), and that the state's authority to monitor the plan had been exercised sparingly.

> employees or members, to collect premiums through payroll deductions or dues check-offs and to remit them to the insurer.

The district court then instructed the jury, over objection, that the Department of Labor's criteria were merely advisory and that no one factor is dispositive. The Ninth Circuit below approved of this "totality of the circumstances" test. (App. A.)

C. Circuit Split

For the purposes of this petition, it is not immediately relevant that the Ninth Circuit panel below ignored longstanding Ninth Circuit law holding that "any one" of the Department of Labor's criteria is dispositive on the question of whether an entity "established or maintained" an insurance plan for purposes of determining ERISA jurisdiction. *Silvera*, 884 F.2d at 426; *Qualls v. Blue Cross of California*, 22 F.3d 839 (9th Cir. 1994); *Kanne v. Connecticut General Life Insurance*, 867 F.2d 489, 492 (9th Cir. 1988).

However, this Court's attention is required to resolve the conflict between the various Circuits on how a district court should determine whether an insurance plan is covered by ERISA. In contrast to longstanding Ninth Circuit law, the Seventh Circuit has held that a district court need not be bound to the Department of Labor criteria and that a totality of circumstances test would be appropriate. *See Variable Annuity Life Ins. Co.*, 814 F.2d at 1135. The Circuit

courts are also split on how to review a trial court's determination of ERISA jurisdiction. In the First, Third and Ninth Circuits, the district court's determination is considered factual and reviewed for clear error. *See, e.g., Wickman v. Northwestern Nat'l Ins. Co.*, 908 F.2d 1077, 1082 (1st Cir. 1990); *Deibler v. United Food and Commercial Workers' Local Union*, 973 F.2d 206, 209-10 (3d Cir. 1992); *Kanne*, 867 F.2d at 492. The Eighth Circuit, on the other hand, considers the question of ERISA jurisdiction a mixed question of law and fact and reviews the issue de novo. *See, e.g., Kulinski v. Medtronic Bio-Medicus, Inc.*, 21 F.3d 254, 256 (8th Cir. 1994).

This Court should resolve these important questions of federal jurisdiction and appellate review.

CONCLUSION

For the reasons stated above, the Court should grant the instant petition and order briefing and argument on the case in this Court.

Dated: December 18, 2007

Respectfully submitted,

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APPENDIX A

237 Fed.Appx. 178

United States Court of Appeals, Ninth Circuit.
UNITED STATES of America, Plaintiff-Appellee,
v.
Gary Wayne RODRIGUES, Defendant-Appellant.
United States of America, Plaintiff-Appellee,
v.
Robin Haunani Rodrigues Sabatini,
Defendant-Appellant.
Nos. 03-10549, 04-10027.

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Appeal from the United States District Court for the District of Hawaii, David A. Ezra, District Judge, Presiding. D.C. No. CR-01-00078-DAE.

Before: PREGERSON, KLEINFELD, and W. FLETCHER, Circuit Judges.

MEMORANDUM*

A jury found Gary Rodrigues, the former Hawaii State Director for the United Public Workers union, guilty of embezzling money from the union[1] and accepting kickbacks in connection with an employee welfare benefit plan.[2] The jury also found Rodrigues and his daughter Robin Sabatini guilty of mail fraud,[3] health care fraud,[4] money laundering,[5] and conspiracy to commit money laundering.[6] We affirm the jury's verdict and order a limited *Ameline* remand.

A. Honest Services Mail Fraud and Honest Services Health Care Fraud.

The defendants argue that: (1) the instruction erroneously failed to require that the government prove a specific misrepresentation or omission made by the defendants as part of the scheme; (2) the instruction did not require that the government prove the defendants acted with an intent to deceive; and (3) the instruction told the jury that honest services included a union official's duties under § 501 of the

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[1] 29 U.S.C. § 501(c).

[2] 18 U.S.C. § 1954.

[3] 18 U.S.C. § 1341.

[4] 18 U.S.C. § 1347.

[5] 18 U.S.C. § 1956(a)(1)(B)(i).

[6] 18 U.S.C. § 1956(h).

Labor-Management Reporting and Disclosure Act (LMRDA).

In *United States v. Williams,* we explained that our court "and other circuits have recognized the viability of the 'intangible rights' theory when the private defendant stands in a fiduciary or trust relationship with the victim of the fraud."[7] Under this theory, the breach or manipulation of the relationship between the actor and the victim satisfies the "fraud" element.[8] Because a "person[ ] who assume[s] a legal duty of loyalty comparable to that owed by an officer or employee to a private entity" represents that he is acting in the best interest of the principal,[9] to do otherwise (at least without telling the principal) is an act of misrepresentation, or, at least, concealment.[10]

Accordingly, "depriving an employer of one's honest services and of its right to have its business

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[7] *United States v. Williams,* 441 F.3d 716, 723 (9th Cir.2006).

[8] *United States v. Bohonus,* 628 F.2d 1167, 1171 (9th Cir.1980).

[9] *See* Harold G. Reuschlein & William A. Gregory, Agency and Partnership, at 121, § 67 (1980) ("The term 'fiduciary' has never been capable of precise definition. [But] [t]he clear implication . . . is that an agent is under duty to act solely and entirely for the benefit of his principal in every matter connected with his agency."); *see also* 29 U.S.C. § 501.

[10] *Cf. United States v. Bohonus,* 628 F.2d 1167, 1171 (9th Cir.1980) ("When a public official is bribed, he is paid for making a decision while purporting to be exercising his independent judgement. The fraud element is therefore satisfied.").

conducted honestly can constitute a 'scheme to defraud' under § 1341,"[11] so long as it is done as part of "a recognizable scheme formed with the intent to defraud."[12] No specific false statement, misrepresentation, or omission is necessary if the "scheme [is] reasonably calculated to deceive."[13] And we analyze this "by a non-technical standard. . . . [S]chemes are condemned which are contrary to public policy or which fail to measure up to the 'reflection of moral uprightness, of fundamental honesty, fair play and right dealing. . . .'"[14]

The instruction did not omit any required elements.[15] It required the jury to find that the defendant "knowingly devised a scheme or artifice to deprive [the union] and its members of their right to defendant Gary Rodrigues's honest services." And it required the jury to find that the scheme was created

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[11] *Id.* at 1172.

[12] *Id.* ("Neither breach of a fiduciary duty, nor the receipt of secret profits, then, would suffice standing alone to show a § 1341 violation; there must be a recognizable scheme formed with the intent to defraud.").

[13] *United States v. Woods*, 335 F.3d 993, 998 (9th Cir.2003) (collecting cases) (concluding that our pre-*Neder* cases remain good law).

[14] *Id.*, quoting *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir.1980); *see also id.* ("Courts have relied on this broad interpretation of 'fraud' to hold numerous types of schemes violative of the mail fraud statute.").

[15] We need not decide whether the reasonable foreseeability of harm instruction was correct because the defendant was the one that asked for it.

"with the intent to deprive [the union] and its members of their right to the honest services of Gary Rodrigues." This sufficiently required some type of intentionally deceitful deprivation.

Additionally, because there is no suggestion that the court misstated Rodrigues's statutory obligations under the LMRDA, and because we agree with the Third Circuit that "the LMRDA established, as a matter of federal law, union members' right to the honest and faithful services of union officials,"[16] we approve of the district court's honest services instruction.

B. Embezzlement of Union Funds.

Rodrigues argues that the indictment failed to state an offense.[17] Because he did not raise this issue below, we review for plain error[18] and "liberally construe the indictment in favor of validity."[19] Because an indictment's purpose is simply to "apprise the defendant with reasonable certainty, of the nature of the

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[16] *United States v. Boffa*, 688 F.2d 919, 930-31 (3d Cir.1982).

[17] *See* Fed.R.Crim.P. 7(c) (indictment "shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged").

[18] *See United States v. Cotton*, 535 U.S. 625, 630-32, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002); *United States v. Velasco-Medina*, 305 F.3d 839, 845-46 (9th Cir.2002).

[19] *United States v. Ross*, 206 F.3d 896, 899 (9th Cir.2000).

accusation against him,"[20] it is acceptable if "the necessary facts appear in any form or by fair construction can be found within the terms of the indictment."[21] It "should be . . . read as a whole[,] . . . read to include facts which are necessarily implied[,] . . . and . . . construed according to common sense."[22] Moreover, an omission will not cause us to reverse unless "it worked to the prejudice of the accused."[23]

The indictment said that Rodrigues committed embezzlement by causing the union to pay Hawaii Dental Service. And the specific amounts of money in the indictment represented the consultant fee percentage of the monies paid to HDS. It was clear to everyone (the grand jury, the parties, the judge, etc.) what the embezzlement charge was about. The pretrial correspondence functioned as a bill of particulars, informing the defense that "the specific amounts

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[20] *Russell v. United States*, 369 U.S. 749, 765, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).

[21] *United States v. Velasco-Medina*, 305 F.3d 839, 846 (9th Cir.2002) (quotation omitted). Rodrigues could have but did not ask for a bill of particulars, which is the appropriate recourse for a defendant who truly cannot figure out what the government is claiming he did. *See* Fed.R.Crim.P. 7(f); *United States v. Long*, 706 F.2d 1044, 1054 (9th Cir.1983) ("A motion for a bill of particulars is appropriate where a defendant requires clarification in order to prepare a defense. . . . It is designed to apprise the defendant of the specific charges being presented to minimize danger of surprise at trial, to aid in preparation and to protect against double jeopardy. . . .") (citations omitted).

[22] *United States v. Buckley*, 689 F.2d 893, 899 (9th Cir.1982).

[23] *Id.* (quotation omitted).

of money . . . were calculated based on the premiums HDS received from [the union] multiplied by the negotiated consultant fee amount." That is how the case was presented to the jury. This vitiated any possible prejudice.[24]

We also reject Rodrigues's argument that there was a constructive amendment to the indictment.[25] The constructive amendment doctrine is meant to ensure that a defendant is not convicted for something for which the grand jury did not indict him.[26] Here, however, it was clear to all before trial that the indictment was based on the sending of money from

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[24] *Cf. United States v. Long,* 706 F.2d 1044, 1054 (9th Cir.1983) ("In determining if a bill of particulars should be ordered in a specific case, a court should consider whether the defendant has been advised adequately of the charges through the indictment and all other disclosures made by the government.") (citations omitted).

[25] A constructive amendment occurs when "the charging terms of the indictment are altered, either literally or in effect, by the prosecutor or a court after the grand jury has last passed upon them." *United States v. Adamson,* 291 F.3d 606, 614 (9th Cir.2002)

[26] *United States v. Adamson,* 291 F.3d 606, 614 (9th Cir.2002) ("The Fifth Amendment guarantees a criminal defendant "[the] right to stand trial only on charges made by a grand jury in its indictment." *United States v. Garcia-Paz,* 282 F.3d 1212, 1215 (9th Cir.2002). After an indictment has been returned and criminal proceedings are underway, the indictment's charges may not be broadened by amendment, either literal or constructive, except by the grand jury itself.").

the union to Hawaii Dental Service to cover consultant fees.[27]

C. Money Laundering and Conspiracy to Commit Money Laundering.

For the money laundering statute to apply, the charged financial transaction must involve "proceeds of specified unlawful activities. . . ."[28] Defendants concede that mail fraud is a specified unlawful activity. But they say that the monies Sabatini deposited were not "proceeds" of the mail fraud because the fraud was a deprivation of the intangible right to honest services as opposed to a scheme to obtain money or property. Thus, according to them, the mail fraud did not produce "proceeds." We disagree. The "use of the mail" element of mail fraud for which the defendants were convicted was the sending of "consultant fee" checks to Sabatini. These checks were "proceeds" of the scheme or artifice to defraud the union.[29]

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[27] We also reject the defendant's argument to the extent that he contends that there was no embezzlement because the assets Rodrigues took or caused to be converted were not union assets. The district court correctly explained, the government presented sufficient evidence for the jury to conclude otherwise.

[28] 18 U.S.C. § 1956.

[29] *Accord United States v. Boscarino*, 437 F.3d 634, 636 (7th Cir.2006) ("Boscarino observes that only 'proceeds' can be laundered, and depriving one's employer of honest services need not yield 'proceeds.' That's true enough, but when the offense does create proceeds, which are laundered to hide detection, it is

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D. Kickbacks.

Rodrigues's theory is that he did not violate the statute because the life insurance plan falls under the governmental plan exception to ERISA. He argues that the instruction given on how to determine whether the union plan was a governmental one was erroneous. And he argues that there was insufficient evidence to justify the jury's verdict that the plan was not a governmental one.

Both of Rodrigues's arguments are based on his reading of *Silvera v. Mutual Life Insurance Co.*,[30] where we concluded that a group benefits insurance policy issued by a private insurance provider to the city should be considered a "governmental plan" even though the "City did not directly fund or underwrite the plan" and "it was [the private provider], not the City, who designed and set up the plan, administered it on behalf of the employees, and was ultimately liable for the payments of benefits."[31] In *Silvera*, we used the Department of Labor's regulation on whether a plan is established through the purchase of insurance to analyze whether the city had established a plan. The regulation says that a plan is *not* established if "no contributions are made by an employer

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sensible to treat them the same as any other proceeds of mail or wire fraud.").

[30] *Silvera v. Mutual Life Ins. Co.*, 884 F.2d 423 (9th Cir.1989).

[31] *Id.* at 425-26.

or employee organization," if "[p]articipation in the program is completely voluntary for employees," and if "[t]he sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program . . . , to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer."[32] Seizing on the court's comment that "behavior inconsistent with any one the above criteria would constitute evidence of the establishment of a plan,"[33] Rodrigues argues that the government had to show each of these three prongs to meet its burden.

Silvera is distinguishable. It dealt with whether the insurance provider or the insurance purchaser was the entity that established or maintained the plan. Here, the dispositive question is whether the insurance purchaser (and thus the entity that established and maintained the plan) was the government or the union, and we conclude that the district court's totality of the circumstances formulation of the challenged instruction, considered as a whole, was a reasonable way to guide the jury to make that determination.[34]

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[32] *Id.* at 426.

[33] *Id.*

[34] *Cf. Stuart v. Unum Life Ins. Co. of America*, 217 F.3d 1145, 1153 (9th Cir.2000) ("A program that satisfies the [safe harbor] regulation's standards will be deemed not to have been "established or maintained" by the employer. The converse,

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We also conclude that there was sufficient evidence to justify the jury's conclusion that the plan was established or maintained by the union, and not the government. Taking the evidence in the light most favorable to the prosecution, we note the following: the government had no role in negotiating the premiums or purchasing the plan; the government allowed its employees to purchase the plan as an alternative to other plans it offered, but did not endorse it over the others; the government only paid 2.5% of the premiums, with the remainder paid by the employees; the government sent its contribution and the employees contribution to the union, who then sent it on to the insurance provider; the union maintained the payment and enrollment records; and the government only audited the records once in four decades. This meets our low threshold for sufficiency of the evidence challenges.

E. Prejudicial Joinder

Rodrigues argues that all of his convictions should be thrown out because the kickback count (Count 102) should not have been joined to the other

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however, is not necessarily true; a program that fails to satisfy the regulation's standards is not automatically deemed to have been "established or maintained" by the employer, but, rather, is subject to further evaluation under the conventional tests.") (quoting *Johnson v. Watts Regulator Co.*, 63 F.3d 1129, 1133 (1st Cir.1995)).

101 counts.[35] Federal Rule of Criminal Procedure 8(a) says that an "indictment . . . may charge a defendant in separate counts with 2 or more offenses if the offenses charged . . . are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan."[36]

In *United States v. Jawara,* we explained that "[s]ame or similar character" cases often present a situation where "line drawing between permissible and improper joinder . . . becomes imprecise and the standards applied confusing" and we "endeavor[ed] . . . to fill in some of the blanks."[37] Based on a review of the *Jawara* factors, initial joinder was appropriate. The offenses charged each involve Rodrigues using his ability to enter contracts on the unions behalf in order to secretly obtain money for himself or the person of his choosing in connection with those contracts. And witnesses who gave testimony on the kickback count offered testimony relevant to some of the other counts.

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[35] Rodrigues also argues that, once joined, the count should have been severed pursuant to Federal Rule Criminal Procedure 14. But we decline to address this argument. Rodrigues waived it by not renewing it at the close of evidence. *United States v. Terry,* 911 F.2d 272, 277 (9th Cir.1990) ("While it is clear that a Rule 14 motion to sever must be renewed at the close of the evidence or it is waived, . . . there is no such requirement for a Rule 8 motion.").

[36] Fed.R.Crim.P. 8(a).

[37] *United States v. Jawara,* 474 F.3d 565, 576 (9th Cir.2007).

F. Sentencing

Defendants were sentenced under the pre-Booker mandatory guidelines scheme. They did not make an *Apprendi*[38] objection at sentencing. The appeal of their sentences is thus controlled by *Ameline*.[39] Accordingly, we order a limited remand for the sentencing judge to determine whether the he would have imposed the same sentences if he had known the guidelines were advisory.

AFFIRMED IN PART AND REMANDED IN PART.

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[38] *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

[39] *United States v. Ameline*, 409 F.3d 1073 (9th Cir.2005) (en banc).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. GARY WAYNE RODRIGUES, Defendant-Appellant.	No. 03-10549 D.C. No. CR-01-00078-DAE District of Hawaii, Honolulu **ORDER** (Filed Aug. 21, 2007)
UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ROBIN HAUNANI RODRIGUES SABATINI, Defendant-Appellant.	No. 04-10027 D.C. No. CR-01-00078-DAE District of Hawaii, Honolulu

Before: PREGERSON, KLEINFELD, and W. FLETCHER, Circuit Judges.

The memorandum disposition filed on June 11, 2007 is AMENDED as follows:

With this amendment, the panel has voted unanimously to deny the petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED. No further petitions will be accepted.